No. 14677

United States Court of Appeals
For the Ninth Circuit

Vance W. Williams, *Appellant,*

vs.

Tidewater Associated Oil Company, *Appellee.*

Appeal from the United States District Court,
Western District of Washington
Northern Division

BRIEF OF APPELLEE

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APPEAL FROM THE UNITED STATES DISTRICT COURT,
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BRIEF OF APPELLEE

PRELIMINARY STATEMENT OF CASE

This personal injury action, brought by a seaman against his employer under the Jones Act (46 U.S.C.A. §688) for alleged acts of negligence resulted in a jury verdict in favor of appellee employer.

The negligence alleged as disclosed by the pretrial order was as follows:

1. That on or about the 12th day of January, 1953, at about the hour of 1:00 o'clock p.m., while the Tanker "Tidewater" was alongside of a dock at Portland, Oregon, the plaintiff was in the course of his employment assisting in carrying a heavy hose from the port side of said vessel to its starboard side.

2. That at said time and place the defendant carelessly and negligently failed to provide to the plaintiff a safe place to work in that the deck area which plaintiff was required to cross was covered

with oil leaving the same in a dangerous and slippery condition, and that said deck of the vessel was covered with an improper type of paint and that the paint was improperly applied in that no abrasive material was added for safe footing rendering the deck generally unnecessarily slippery and hazardous.

3. That as a direct and proximate result of the defendant's negligence the plaintiff slipped and fell with great force and violence. (R. 4)

COUNTER-STATEMENT OF THE CASE

Appellant's injuries occurred in the afternoon of January 12, 1953, at Portland, Oregon, while serving as maintenance man as a member of the crew of the tanker "TIDEWATER." The vessel was lying alongside her dock. Appellant and another seaman were engaged in carrying a hose from the port side of the foredeck to the starboard side, when he slipped (R. 98). There was some confusion among the men as to the route to pursue (R. 98). The men stopped for a discussion and then proceeded across the deck. As they did so, appellant's feet "gradually slid out from under me" and he fell to the deck (R. 98). The deck was slippery and wet from rain and mist (R. 154).

Appellant did not observe the condition of the deck he was traversing at the time of his accident (R. 99). He was the last of the three or four men carrying the hose (R. 97). Appellant did not see any oil on the deck where he slipped nor did he notice any oil on the deck at any time that he was carrying the hose (R. 154, 150). He was not warned by any of the men ahead of him

carrying the hose that there was any oil on the deck (R. 154).

Appellant first visited the foredeck of the tanker shortly before his accident which occurred around 2:00 P.M. In the morning he had worked on the after deck (R. 75). When he went forward in the afternoon the hose had been uncoupled and was lying on the deck (R. 82). As he proceeded along the foredeck in the direction of the hose, he did not notice any grease or oil on the port deck (R. 137). Prior to handling the hose he carried a reducer from the forward end of the port deck to the midship house, and while in the vicinity of tank No. 3 he slipped in what he surmised was a combination of oil and rain (R. 137). Appellant testified it was routine practice on tankers to clean up any oil spill as soon as discovered so he got a bucket of sand and sprinkled it in the area (R. 139). He did not know where the oil had come from in which he slipped (R. 138). After sanding this area appellant examined the foredeck for other oil spills requiring sanding but saw none (R. 142). He then proceeded forward to where the hose he was to carry was lying on the deck. He saw no grease or oil in the vicinity of the hose (R. 146) although the foredeck was "thoroughly wet."

Thomas Smith and Robert Hamilton, who assisted appellant in carrying the hose, testified in his behalf. Smith testified that Williams slipped between No. 2 and No. 3 tanks in an oil spill (R. 50), which was immediately sanded. Smith claimed the area of the oil spill was 50 feet long and 10 feet wide (R. 57). Smith's version of the alleged "oil spill" was impeached by appellee's introduction of Smith's signed statement (Ex-

hibit A-1) stating "there was no oil spilled at the spot where Williams fell" (R. 78, 79). Smith sought to explain the discrepancy between his oral testimony and written statement by alleging he was drunk the night before he signed the impeaching statement (R. 64).

Hamilton testified that he had not noticed any oil on the deck of the "TIDEWATER" any time before the accident (R. 193). He testified after Williams fell he went to his assistance and observed a three or four-foot area in which appellant slipped which "appeared" to be a combination of oil and water (R. 177), and which he had not noticed before. Hamilton was in front of Williams who was the last man on the hose. Like Smith, Hamilton's testimony was impeached by a written statement (Defendant's exhibit A-4) (R. 199, 200) wherein Hamilton had stated "so far as I know there was no oil or sand or abrasive material around the riser at the time when Williams fell. I don't remember if there was any oil on the deck at the exact spot where Williams fell."

Second Mate De Jong, the watch officer on the "TIDEWATER" during the time appellant and the other crew members were handling the hose testified that he made routine inspections of the foredeck, both before and after Williams' accident, but saw no oil on the deck (R. 259).

Appellant's allegation that improper deck paint was used on the deck of the "TIDEWATER" at the time of appellant's accident was a sharply disputed factual question. Appellant's witnesses testified that the deck paint

was not sanded. This was denied by Chief Mate Daly (R. 200, 221, 239) and Second Mate DeJong (R. 262).

Appellant introduced in evidence the accident report of the M/V "TIDEWATER" pertaining to plaintiff's injury (plaintiff's Exhibit 1). In answer to a query as to "how injury occurred," the accident report answer was "slipped when carrying a slop hose on oily deck."

This was explained by Second Mate DeJong as having been placed in the accident report by him based upon the statement of the appellant as to the cause of his accident some time after its occurrence (R. 261).

The jury returned a verdict in favor of appellee finding Williams' accident was not due to negligence on its part (R. 9).

ARGUMENT

Appellant's First Assignment of Error

Election Is Statutory Requisite Under Jones Act Where Seaman's Complaint Commingles Causes of Action for Negligence and Unseaworthiness

The Jones Act (46 U.S.C.A. §688) was enacted in 1920 and reads as follows:

> "§688. Recovery for injury to or death of seaman.
>
> "Any seaman who shall suffer personal injury in the course of his employment may, *at his election,* maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal represen-

> tative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located. Mar. 4, 1915, c. 153, §20, 38 Stat. 1185; June 5, 1920, c. 250, §33, 41 Stat. 1007." (Italics ours)

Prior to its passage, seamen who suffered personal injuries in the service of the ship had only a cause of action against the shipowner or vessel for indemnity because of the unseaworthiness of the vessel or her appliances. There was no death action in admiralty. General maritime law precluded a recovery to seamen for injuries caused by the negligence of the Master or any crew member of the vessel. *The Osceola,* 189 U.S. 158, 47 L.ed. 760.

Seamen enforced this right of indemnity for unseaworthiness, in admiralty, either *in personam* or *in rem,* in addition to his admiralty remedies for unseaworthiness, the seaman could enforce this claim at common law by virtue of the "saving to suitors" clause of the Judiciary Act of 1789 (1 Stat. at L. 76, 77, Chap. 20) "saving to suitors a common law remedy where the common law was competent to give it." Thus the common law courts of the state, and the law side of the Federal Court, in diversity cases, where available forum to seamen to litigate their claim for indemnity in addition to admiralty forum.

Jones Act Creates New Cause of Action

The Jones Act created a *new* and *substantive* and alternative cause of action in favor of the seamen based upon negligence to be enforced "at his election." This election has been continuously defined by the United States Supreme Court since 1924 in a series of decisions as an election between the choice of an action for an indemnity for unseaworthiness under the general maritime law or a cause of action arising out of negligence based upon the new statute.

In the case of *Panama Railroad v. Johnson* (1924) 264 U.S. 375, 68 L.ed. 748, the elements of the statutory election under the Jones Act were first delineated. The court was considering the constitutionality of the Jones Act which was attacked as violative of the uniformity demanded of the maritime law.

In discussing the essentials of the election prescribed by the Jones Act, the court said:

> "Rightly understood, the statute neither withdraws injuries to seamen from the reach and operation of the maritime law, nor enables the seamen to do so. On the contrary, it brings into that law new rules, drawn from another system, and extends to injured seamen a right to invoke, at their election, either the relief accorded by the old rules, or that provided by the new rules. *The election is between alternatives accorded by the maritime law as modified, and not between that law and some non-maritime system."* (Italics ours)

In *Engel v. Davenport* (1926) 271 U.S. 33, 70 L.ed. 813, the court again redefined the elements of the statutory election required by the Jones Act as follows:

> " * * * Here the complaint contains an affirmative averment of negligence in respect to the appliance. And, having been brought after the passage of the Merchant Marine Act, we think the suit is to be regarded as one founded on that Act, in which the petitioner, instead of invoking, as he might, the relief accorded him by the old maritime rules, has elected to seek that provided by the new rules in an action at law based upon negligence * * * in which he not only assumes the burden of proving negligence, but also, under Sec. 3 of the Employers Liability Act, subjects himself to a reduction of the damages in proportion to any contributory negligence on his part. * * * "

In *Plamals v. The Pinar Del Rio* (1928) 277 U.S. 150, 72 L.ed. 827, the court was faced with the question as to whether or not the Jones Act carried with it the traditional admiralty lien. Again, redefining the elements of the statutory election under the Jones Act the court said:

> "In the system from which these new rules come no lien exists to secure claims arising under them, and of course, no right to proceed *in rem*. We cannot conclude that the mere incorporation into the maritime law of the rights which they create to pursue the employer was enough to give rise to a lien against the vessel upon which the injury occurred. The section under consideration does not undertake to impose liability on the ship itself, but by positive words indicates a contrary purpose. *Seamen may invoke, at their election, the relief accorded by the old rules against the ship, or that provided by the new against the employer. But they may not have the benefit of both."* (Italics ours)

The elements of the statutory election required under

the Jones Act were next reiterated by the Supreme Court in the case of *Pacific Steamship Company v. Peterson* (1928) 278 U.S. 130, 73 L.ed. 220. This case directly involved the judicial consideration of the phrase that "at his election" of the Jones Act since it was alleged that the seaman, by accepting wages, maintenance and cure had made his election under the Jones Act and could not sue for negligence. The court said:

> "The right to recover compensatory damages under the new rule for injuries caused by negligence is, however, an alternative of the right to recover indemnity under the old rules on the ground that the injuries were occasioned by unseaworthiness; and it is between these two inconsistent remedies for an injury, both grounded on tort, that we think an election is to be made under the maritime law as modified by the statute. * * * "

The court further stated at page 224:

> " * * * And we conclude that the alternative measures of relief accorded him, between which he is given an election, are merely the right under the new rule to recover compensatory damages for injuries caused by negligence and the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness; * * * "

Any question as to the rule that the election prescribed under the Jones Act was a choice between the rights given under the general maritime law for indemnity and the alternative statutory right for negligence under the Jones Act was set at rest in the case of *Lindgren v. United States* (1930) 281 U.S. 38, 74 L.ed. 686. In this case Judge Sanford characterized the Jones Act as giving "new and substantive rights."

In the *Lindgren* case, *supra,* the administrator of a deceased seaman leaving no designated beneficiaries under the Jones Act was denied a recovery under the Virginia State death statute for negligence. The court held that Congress had preempted the field in seamen injury cases by the enactment of the Jones Act. The court pointed out that prior to the enactment of the Jones Act the general maritime law gave no death action for negligence. The court further noted that a statutory election was not required in death actions under the Jones Act as in the case of personal injury to seamen since no choice of remedies was involved between a right of indemnity for seaworthiness and a right of action for negligence under the Jones Act in death actions.

The court said:

> "Nor can the libel be sustained as one to recover indemnity for Barford's death under the old maritime rules on the ground that the injuries were occasioned by the unseaworthiness of the vessel. Aside from the fact that the libel does not allege the unseaworthiness of the vessel and is based upon negligence alone, an insuperable objection to this suggestion is that the prior maritime law, as hereinabove stated, gave no right to recover indemnity for the death of a seaman, although occasioned by unseaworthiness of the vessel. The statement in *The Osceola,* 189 U.S. 175, 47 L.ed. 764, 23 Sup.Ct. Rep. 483, on which the administrator relies, relates only to the seaman's own right to recover for personal injuries occasioned by unseaworthiness of the vessel, and confers no right whatever upon his personal representatives to recover indemnity for his death. *Apparently for this reason the words 'at*

*his election' * * * which appear in the first clause of Sec. 33 of the Merchant Marine Act, relating to the personal right of action of an injured seaman, and, as held in Pacific S.S. Co. v. Peterson,* 278 U.S. 139, 73 L.ed. 224, 49 Sup. Ct. Rep. 75, *gave him, as alternative measures of relief, 'an election * * * (between) the right under the new rule to recover compesatory damages for injuries caused by negligence, and (48) the right under the old rules to recover indemnity for injuries occasioned by unseaworthiness' * * * were omitted from the second clause of Sec. 33 of the Merchant Marine Act, relating to the right of the personal representative to recover damages for the seaman's death, since there was no right to indemnity under the prior maritime law which he might have elected to pursue. And for the reasons already stated, and in the absence of any right of election, the right of action given the personal representative by the second clause of Sec. 33 to recover damages for the seaman's death when caused by negligence, for and on behalf of designated beneficiaries, is necessarily exclusive and precludes the right of recovery of indemnity for his death by reason of unseaworthiness of the vessel, irrespective of negligence, which cannot be eked out by resort to the death statute of the state in which the injury was received."* (Italics ours)

In reaching its conclusion from an analysis of the entire context of the Jones Act, that the election required of a seaman suing for personal injuries was between unseaworthiness and negligence the court relied and cited the case of *Pacific Steamship Company v. Peterson, supra.*

Supreme Court Definition of Statutory Election Adhered to by Lower Courts

In the intervening years since the above Supreme Court decisions, the various circuit and district courts have invariably followed the rule that a seaman must elect, *in advance of trial,* whether he will cast his action under the general maritime law of unseaworthiness or sue under the alternative remedy for negligence given him by the Jones Act.

This court inferentially followed the rule in the case of *Hammond Lumber Company v. Sandin* (1927) 17 F.(2d) 760, where the court said at page 762:

> "* * * But we think that the election required by the statute is sufficiently indicated where a person, entitled to the benefit thereof, brings an action at law alleging negligence and praying for damages. * * *"

In *Skolar v. Lehigh Valley R.R.* (2 C.C.A., 1932) 60 F.(2d) 893, it was argued that the plaintiff was not required to make his election between unseaworthiness and negligence in advance of the trial of the case but that such choice must be made after all of the evidence was presented. The Second Circuit, relying on the Supreme Court cases previously quoted, rejected the contention as follows:

> "* * * If he may present both bases for recovery in the same suit, we are unable to see wherein the statutory right is an alternative to the right to indemnity existing under the old maritime rules, or wherein he has been required to elect between the 'two inconsistent remedies.' * * *"

In a later case, *McGhee v. United States of America*

(2 C.C.A., 1947) 165 F.(2d) 287, this circuit affirmed its prior ruling as follows:

> "We do not mean that a seaman may go to trial on both causes of action simultaneously, and recover upon one or the other as the evidence turns out; we said the opposite in *Skolar v. Lehigh Valley R. Co.* * * *."

The Fifth Circuit was confronted with this identical question in *Smith v. Lykes Brothers-Ripley S.S. Co.* (1939) 105 F.(2d) 604, and the court restated the rights of a seaman for injuries as follows:

> " * * * Upon the facts as alleged, which must be taken as true on this appeal, three causes of action accrued to appellant when he was injured by reason of the unsafe condition of the ship, due to the negligence of appellee. The source of each was as follows:
>
> "(a) The right to recover wages, and the expense of maintenance and cure, which was an incident to his contract for wages, payable irrespective of negligence unless the injury was brought about by the seaman's willful misconduct.
>
> "(b) The right under maritime law, to recover indemnity for injury caused by the unseaworthiness of the vessel, which was predicated upon the negligence of the owner.
>
> "(c) The right, under the Merchant Marine Act, *supra,* to recover indemnity for a personal injury suffered in the course of his employment.
>
> "The legal wrong in the prior action was an invasion of the seaman's primary right of bodily safety, but the legal wrong in the present action was a breach of duty to provide the necessary maintenance and cure. The three causes of action, (a), (b), and (c), above mentioned, arose at the same

time but depended upon different facts and distinct principles of law. *The appellant was required to elect between (b) and (c), the tort actions* but no election was required as to (a), wherein the duty of the appellee arose as an incident to the contract for wages. * * * " (Italics ours)

Development of Minority Doctrine That Election Refers to Choice of Remedies Between a Civil Action and a Suit in Admiralty

Based upon a series of legal misadventures, the Third Circuit has recently evolved the novel doctrine that the statutory election required under the Jones Act is only between a choice of a civil action or a suit in admiralty and that actions for negligence and unseaworthiness can be comingled and enforced co-terminously. The genesis of this erroneous doctrine occurred in the case of *Branic v. Wheeling Steel Corporation* (1945) 152 F.(2d) 887. This case had nothing to do with the statutory election prescribed by the Jones Act but was concerned only with venue.

Misconstruing this decision, and the holdings of the United States Supreme Court in the case of *Baltimore Steamship Company v. Phillips* (1927) 274 U.S. 316, 71 L.ed. 1069, the Second Circuit next in the case of *German v. Carnegie-Illinois Steel Company* (1946) 156 F.(2d) 977, ignored the Supreme Court decisions and declined to require the plaintiff seaman to elect during the presentation of his case between negligence and unseaworthiness. The announced reason for this startling decision was that if the seaman made an improper election it might prove disadvantageous to him. This con-

sideration is obviously a matter of Congressional and not judicial concern.

The court cited the case of *Sieracki v. Seas Shipping Company* (3 C.C.A., 1945) 149 F.(2d) 98, as authority for such a holding. Yet the *Sieracki* case concerned a longshoreman who was not required by statute to make the election required of seamen by the Jones Act. In the *German* case the court did not attempt to further define the requisites of the statutory election.

This occurred in a subsequent case of *McCarthy v. American Eastern Corporation* (1949) 175 F.(2d) 724, where Judge Maris defined the statutory election prescribed by the Jones Act as follows:

> "In our view the election to which the Jones Act refers is an election of remedies as *between a suit in admiralty and a civil action.* Prior to the passage of the Jones Act, unless there was diversity of citizenship, a seaman was compelled in the federal court to assert his cause of action for injuries in a suit in admiralty in which there was no jury trial. It was the purpose of the election clause of the Jones Act, we think, to make certain that an injured seaman, instead of suing in admiralty, could at his option assert his cause of action for personal injuries in the federal court in an action at law regardless of diversity of citizenship, thereby obtaining the right to a jury trial in every case in which the injuries were serious enough to bring the claim within the jurisdictional amount of $3,000.00. For since an act of Congress, the Jones Act, gives the right the federal courts have jurisdiction of suits to enforce it under section 1331 of Title 28 U.S.C.A., section 24 (1) of Judicial Code of 1911, regardless of the citizenship of the parties."

This decision was predicated upon the *Baltimore Steamship Co.* case, *supra.*

In a perfunctory opinion, the Second Circuit in the case of *Balado v. Lykes Bros. Steamship Company* (1950) 179 F.(2d) 943, adopted Judge Maris' reasoning that the statutory election under the Jones Act pertains only to the selection of forum.

A detailed analysis of the litigation involved in the *Baltimore Steamship Company* case, *supra,* will conclusively establish the judicial misconstruction of its doctrine by the Third Circuit.

Phillips, a seaman, was injured in 1921 and filed a libel against the United States (286 Fed. 631). It originally charged both unseaworthiness and negligence but exceptions were sustained to the commingling of both grounds and Phillips thereupon elected to proceed on the grounds of negligence. The District Court said:

> "The libelant charges negligence of the owners of the ship in that the cleater sockets supporting the strongback were not of proper design or sufficient strength; that the owners of the steamship were incompetent and respondent owed a special duty to the libelant because of his youth and experience. The court dismissed the action, finding that libelant's accident was not due to the grounds of negligence alleged but to the gross negligence in the way the dunnage was being removed."

In the *McCarthy* case, *supra,* Judge Maris' statement that the libel in admiralty was based upon unseaworthiness is incorrect.

Phillips next instituted a second action at law. *Phillips v. Baltimore S.S. Company* (U.S.D.C., N.Y.) 295

Fed. 323, alleging that his accident was due to the negligence of the officers of his vessel in the operation of the same and of the winches and appliance and the failure to give warning to the plaintiff of the impending danger.

The complaint was dismissed on the grounds of *res judicata*. Judge Inch said:

> "The cause of action in both actions is to recover for personal injuries due to neglect of duty by defendants."

An appeal was taken to the Second Circuit of Appeals and while this appeal was pending the matter was remitted to the District Court which reversed its earlier dismissal of the action on the grounds of *res judicata* and the case was tried on its merits resulting in a judgment for the plaintiff. Defendant appealed to the Second Circuit, *Baltimore Steamship Company v. Phillips,* 9 F.(2d) 902, where the decision of the District Court was affirmed. The Circuit Court held the doctrine of *res judicata* was inapplicable and that the second action of Phillips could be maintained since the allegations of negligence therein differed from those in the initial suit. It held *res judicata* would not defeat recovery.

On appeal of the case to the United States Supreme Court (*Baltimore Steamship Company v. Phillips, supra*) the court ruled that the doctrine of *res judicata* applied and that the plaintiff was not at liberty to split up his grounds of negligence and prosecute them by piece meal. It dismissed the appeal for this reason. The court said:

> "Here the Court below concluded that the cause

of action set up in the second case was not the same as that alleged in the first, because the grounds of negligence pleaded were distinct and different in character, the grounds alleged in the first case being the use of defective appliances and the second the negligent operation of the appliances by the officers and coemployees. On principle, it is perfectly plain that the respondent suffered by one actionable wrong and was entitled but one recovery whether his injury was due to one or the other of the several distinct acts of alleged negligence or to a combination of some or all of them."

The court further said:

> "The mere multiplication of grounds of negligence allegedly causing the same injury, does not result in multiplying the causes of action."

The court further said:

> "It follows that here both the libel and the subsequent action were prosecuted under the maritime law and every ground of recovery open to respondent in the second case was equally open to him in the first."

It is obvious by the phrase "maritime law," Judge Sutherland was referring to the Jones Act which he had discussed immediately prior to the above quotation and that his observation is based upon the rule of *res judicata* applied to a negligence action.

A study of the *rationale* of the *Baltimore S.S.* case, *supra,* establishes that the court was concerned solely with the aplication of the doctrine of *res judicata* after Phillips had made his initial statutory election under the Jones Act to sue for negligence. The effect of the decision is to establish that the seaman must plead all

possible grounds of negligence after electing to sue under the Jones Act. It affords no valid basis for the inferences placed upon it in the *German, McCarthy* and *Balado* cases, *supra,* justifying the rule that the statutory election under the Jones Act involves a choice of remedies between the civil action and a suit in admiralty.

The lower trial judge made a painstaking analysis of the extensive litigation involved in the *Baltimore S.S. Company* case and reached the above conclusion (R. 13, 14). This likewise was the opinion of United States District Judge Hall in the case of *Reed v. The Arkansas* (D.C. S.D. Cal.) 150 A.M.C. 1410:

> "I am unable to reconcile the plain language of the statute and the above cited cases with the third circuit case of *German v. Carnegie-Illinois Steel Corp.,* 1946 A.M.C. 1590, 156 F.(2d) 977.
>
> "Clearly an election must be made. Under the above cases, it cannot be made, either at the conclusion of the evidence, or after judgment. It, therefore, must and should be made before trial. It is just and proper that it should be made sufficiently in advance of trial to allow a defendant to prepare, and to know upon which cause of action he must prepare. For the same reason it is proper that the election be made before the defendant is required to plead. The motion in the instant case is proper at this time and it is granted."

See also *Burkholder v. United States* (E.D. Pa. 1944) 60 F.Supp. 700.

Requiring an election between substantive rights is a commonplace of legal jurisprudence as mentioned by

Judge Van de Vanter in the *Panama & Pacific Railway* case, *supra,* the court said:

> "There are many instances in the law where a person who is entitled to sue may choose between alternative measures of redress and mode of enforcement; and this has been true since before the Constitution."

It is to be further noted that sequentially the *Baltimore Steamship Co.* case, *supra,* was decided by the United States Supreme Court prior to its decision of *Plamals, Pacific Steamship Company* and *Lindgren* cases, *supra,* and in those subsequent cases, no reference is made to the *Baltimore S.S. Company* case as being contradictory to its previously announced doctrine of requiring an election.

To interpret the statutory election under the Jones Act as contended for by appellant would render that phrase utterly meaningless. It would defeat the specific Congressional mandate of the Jones Act which Congress has never subsequently revised.

It is an elementary rule of statutory construction that in the absence of ambiguity, words must be given their natural meaning. "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part would be inoperative or superfluous, void or insignificant * * * " Statutory Construction, Sunderland (1943) Vol. 2 §4705, p. 3309.

Since prior to enactment of the Jones Act, the seaman had a choice of formulas as to whether he would enforce his then remedy for indemnity by a civil action

at law or a suit in admiralty, the construction contended for by the appellant would give the seaman rights he already possessed of which Congress was aware when it passed the Jones Act. Congress cannot be presumed to have indulged in such meaningless legislation.

For the above reasons we respectfully contend that the pre-trial order of the lower court requiring appellant to elect between unseaworthiness and negligence under the Jones Act was correct in law and must be sustained.

Requiring Election Was Harmless Error

In any event, requiring the plaintiff to elect between negligence and unseaworthiness was harmless and non-prejudicial error since even if appellant's evidence established that he did step in a spot of grease on the deck which caused him to fall the condition of the deck was a transitory one which would not sustain an action for unseaworthiness against the ship owner.

Whether appellant slipped in any grease at all is a matter of conjecture and speculation from the record. The appellant tendered no evidence as to how long the alleged spot of grease had been on the deck previous to his fall nor how it got there. There can be no liability for unseaworthines for such unexplained or transitory condition of the deck and had the issue of unseaworthiness remained in the case, it would have had to be withdrawn from the jury's consideration as a matter of law.

In the case of *Cookingham v. United States* (3 C.C.A.) 184 F.(2d) 213; cert. denied, 340 U.S. 935, 95

L.ed. 675 where the seaman slipped on a substance, presumably jello while going doing a stairway leading to the chill box, the court said:

> "We agree with the district court, however, that the doctrine of unseaworthiness does not extend so far as to require the owner to keep appliances which are inherently sound and seaworthy absolutely free at all times from transitory unsafe conditions resulting from their use, as happened in the case before us. *Mahnich v. Southern S.S. Co.,* 1944, 321 U.S. 96, 66 S.Ct. 455, 88 L.ed. 561, is urged to the contrary. But that case is clearly distinguishable. There the seaman was injured by a fall from a staging which gave way when a defective rope supporting it parted. The rope, an essential part of the ship's gear, was itself inherently defective and, therefore, unseaworthy.
>
> "In the present case the stairway upon which the libellant slipped was perfectly sound, its unsafe condition being the sole result of the temporary presence of a foreign substance upon it. To extend the doctrine of unseaworthiness to cover such a case as this would be to make the shipowner an insurer against every fortuitous or negligent act on shipboard which results in temporarily rendering an appliance less than safe even though he may have no knowledge of or control over its happening, and without giving him a reasonable opportunity, such as is afforded by the safe place to work doctrine of the law of negligence, to correct the condition before he becomes liable for it. The ancient admiralty doctrine of unseaworthiness has never gone so far."

In the later case of *Shannon v. Union Barge Line Corporation* (1952) (3 C.C.A.) 194 F.(2d) 584, the

court followed the Cookingham rule in an action brought for unseaworthiness and under the Jones Act for an alleged spot on the deck. The court said:

> "Assuming that there was oil on the deck, how did it get there and who put it there? It is argued on Shannon's behalf that it must have come there through the act of other employees. Therefore, the argument runs, we are not concerned with the many cases denying recovery where no proof showed existence of a hazardous condition long enough to permit its discovery by the defendant. These cases embody the rule that a defendant is not to be held liable for injuries resulting from unsafe conditions on his premises unless he has had a reasonable opportunity to discover and correct the hazard. See Restatement of Torts, §343."

Certiorari was denied in this case at 344, U.S. 846, 97 L.ed. 658.

In *Daniels v. Pacific Atlantic Steamship Company* (1954) (E.D. N.Y.) 120 F.Supp. 96, the court considered the question of whether the mere presence of a spot of oil or grease constituted unseaworthiness, as a matter of law and rejected the contention. The court said:

> "The mere presence of grease or oil or other transitory substance on a deck of a vessel, causing one to slip and sustain injuries has been held not to constitute unseaworthiness. The ship owner is not an insurer of safety. *Hanrahan v. Pacific Transport* Co., 2 Cir. 1919, 262 F. 951, certiorari denied 252 U.S. 579, 40 S.Ct. 345, 64 L.Ed. 726; *The Seeandbee, supra; Adamowski v. Gulf Oil Corporation, supra; Cookingham v. United States,* 3 Cir., 1950, 184 F. 2d 213; *Holliday v. Pacific Atlantic*

S.S. Co., supra; Shannon v. Union Barge Line Corp., supra, and *Hawn v. Pope & Talbot, Inc., supra.* In the *Hanrahan v. Pacific Transport Company* case, the court determined that the temporary absence of a handrail did not warrant a finding of unseaworthiness. As heretofore stated, it was held in *The Seeandbee* case that the presence of grease and oil on the deck did not render the vessel unseaworthy. In the *Adamowski* case (93 F. Supp. 117), the plaintiff claimed he slipped while going through a dark passageway, where later an oil spot was discovered. The court said, * * * the defendant cannot be held liable for unseaworthiness * * *. 'The passageway in which the plaintiff slipped was perfectly sound.' In the *Cookingham* case, it was held that a transitory unsafe substance on a stairway, such as jello, was not unseaworthiness. In the *Holliday* case, the court followed the *Cookingham* case and held that wires protruding from a package or box in an ice-box, did not amount to unseaworthiness. In the *Shannon* case, the claimant slipped on an oil spot on a deck and fell against a metallic bar, running diagonally across a doorway. The bar was in good repair. It was held that no unseaworthiness existed. In the *Hawn v. Pope & Talbot* case, the court followed the *Cookingham* case and stated that a deck made slippery because of grain dust from loading was a transitory unsafe condition, resulting from the normal use and operation of the ship, involving no inherently defective condition and hence not unseaworthy."

Since the record affirmatively established that the alleged spot of grease in which appellant fell was a transitory condition which could not constitute an unseaworthy condition under the authorities cited it was

harmless and non-prejudicial error in requiring the appellant to elect between negligence or unseaworthiness, assuming such an election is required under the Jones Act.

Answers to Second Assignment of Error

This assignment is predicated upon an inacurrate and incomplete statement of the record. There is no evidence as to how the alleged spot of grease (if such it were) got on the deck nor how long it had been present before appellant's accident. Appellant did not see it and the credibility of appellant's two witnesses, Smith and Hamilton (neither of whom claim to have seen the spot of grease before the accident, but soon claimed they saw it afterwards) was completely destroyed by their conflicting written statements as reflected in the jury's verdict. The court submitted the case to the jury on the issue of negligence on proper instructions, none of which are assigned as error. In dealing with the "transitory object" doctrine in negligence the court instructed as follows:

> "To find a defendant negligent in this particular, if you were to find that there was oil at the place where the plaintiff fell, you must find not only that there was this oily condition, which caused the plaintiff to fall, but also that the defendant or its employees knew, or in the exercise of reasonable care ought to have known of the condition and had unreasonably failed to remove it, the defendant is not liable for transitory danger of such character in the absence of actual constructive knowledge of the existence of the condition." (R. 296)

In the *Daniels* case, *supra,* the court said (p. 97):

> "There is no evidence that the oil on the wheelhouse floor was there for any length of time prior to the accident. Unless the defendant had actual or constructive notice of the condition so as to furnish it with an adequate opportunity to remedy the condition, then there is no cause of action for negligence under the Jones Act. *Boyce v. Seas Shipping Co.,* 2 Cir. 1945, 152 F. 2d 658; *Anderson v. Lorentzen,* 2 Cir. 160 F. 2d 173; *Lauro v. United States,* 2 Cir. 162 F. 2d 32; *Guerrini v. United States,* 2 Cir. 1948, 167 F. 2d 352; *Adamowski v. Gulf Oil Corporation,* D.C. 93 F. Supp, 115; Id. 3 Cir. 197 F. 2d 523, certiorari denied; *Adamowski v. Bard,* 343 U.S. 906, 72 S.Ct. 634, 96 L.Ed. 1324; *Holliday v. Pacific Atlantic S.S. Co.,* D.C. 99 F. Supp. 173, reversed on other grounds 3 Cir. 197 F. 2d 610, certiorari denied 345 U.S. 922, 73 S.Ct. 780, 97 L.ed. 1354; *Shannon v. Union Barge Line Corp.,* 3 Cir. 194 F. 2d 584, certiorari denied 344 U.S. 846, 73 S. Ct. 62, 97 L. ed. 658. The court adheres to the dismissal of the claim for negligence at the time both sides rested."

In *Blodow v. Pan Pacific Fisheries Company,* 275 P. (2d) 795, the California District Court of Appeals was concerned with a factual situation similar to the case at bar. The plaintiff personally saw no substance on the deck nor did anyone else. He ascribed his fall to "there was just no traction there." In dismissing the action for negligence under the Jones Act the court said:

> "Not having produced anyone, including appellant himself, who saw any foreign substance on the hatch cover, we are reduced to mere conjecture as to whether there was any substance, and if so, what

> it was, and if determined, who placed or permitted it there, and how long before the unfortunate accident. Appellant's evidence being of such nebulous texture, it is readily understandable that the jury found for the respondents."

See also *Pietryzk v. Dollar Steamship Lines,* 31 Cal. App.(2d) 584, 88 P.(2d) 783.

Gladstone v. Matson Navigation Company, 269 P. (2d) 37, where the court said at page 39:

> "While generally there is an absolute liability on a shipowner regardless of notice, for the unseaworthy character of his ship, where there is merely a transitory unseaworthiness,and no fault or failure of appliance or equipment, the shipowners' liability arises only from failure to remove that transitory unseaworthiness within a reasonable time of notice, actual or constructive, or from failure to use ordinary care to keep the ship free from transitory unseaworthiness. Thus either under the Jones Act or the general maritime law pertaining to transitory conditions the rule is practically the same in requiring notice of the condition."

We submit that there is no merit whatever in this assignment of error and it would have been error for the lower court to have granted a new trial under the record and the law.

Answer to Third Assignment of Error

Undoubtedly the testimony was that when oil spill was discovered on the deck of the tanker "Tidewater" it was to be removed as soon as possible. This practice indicates the high safety standards enforced

on the M/V "TIDEWATER." But this salutary rule cannot be translated into making appellee shipowner legally liable for the presence of undisclosed and unascertained transitory objects on the deck of the vessel. Such a rule would make the shipowner an insurer as to the presence of any transitory objects on the deck. The courts have refused to place such an impossible and clairvoyant burden on the American shipowner as reflected in the authorities cited herein. Unless the shipowner has actual or constructive notice of the presence of a transitory object upon the deck and fails to remove it in a reasonable time, there is no liability under the Jones Act for negligence.

Appellant's contention that, absent knowledge of the existence of a transitory object on the vessel's deck, the shipowner is obliged as a matter of law to remove it immediately, finds no support in the authorities cited by appellant and is contrary to an unbroken line of decisions cited elsewhere in the brief. In reference to the case of *Adams v. American President Lines,* 23 Cal. (2d) 681 (146 P. (2d) 1) upon which appellant relies, it is to be noted that in the recent case of *Blodow v. Pan Pacific Fisheries, supra,* the California court in construing its earlier decision said:

> "Appellant relies strongly upon *Adams v. American President Lines,* 23 Cal. (2d) 681 (146 P.(2d) 1), in which a seaman slipped on an orange peel. While there is a factual similarity, the question raised upon appeal was dissimilar. The court there was concerned primarily with whether the acts complained of, the eating of oranges and the discarding of peels, were within the scope of authority or fellow-seamen, and it found (p. 687)

> that as well as work to a seaman 'Necessary incidents of life, therefore, such as sleeping, eating, washing, etc., are contemplated to be within the scope of the employment.' No such issue is involved in the instant case."

As recently stated by this court in *Freitas v. Pacific Atlantic Steamship Company,* 218 F.(2d) 649:

> "The law does not impose on the shipowner the burden of an insurer nor is the owner under a duty to provide an accident proof ship."

In *Manhat v. U.S.* (1955, 2 C.C.A.) 220 F.(2d) 143, the court likewise said:

> "Under no theory could a standard be considered reasonable which imposed upon the shipowner a duty to safeguard absolutely against the possibility that the handle would be moved by one of these men."

We respectfully urge that there is no merit in this assignment of error.

CONCLUSION

We submit that appellant has advanced no valid reason why the jury's verdict in this case should be disturbed and respectfully request its affirmance by this tribunal.

Repectfully submitted,

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